

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA
3 BEFORE THE HONORABLE GLORIA M. NAVARRO, DISTRICT JUDGE
4 ---o0o---

4 UNITED STATES OF AMERICA, :
5 :
6 Plaintiff, : No. 2:16-cr-100-GMN-CWH
7 :
8 -vs- : November 7, 2016
9 :
10 JAN ROUVEN FUECHTENER, : Las Vegas, Nevada
11 :
12 Defendant. :
13 _____ :

14
15
16
17
18
19
20
21
22
23
24
25
TRANSCRIPT OF CALENDAR CALL

APPEARANCES:

FOR THE PLAINTIFF: LISA CARTIER-GIROUX and
ELHAM ROOHANI
Assistant United States Attorneys
Las Vegas, Nevada

FOR THE DEFENDANT: JESS MARCHESE and BENJAMIN DURHAM
Attorneys at Law
Las Vegas, Nevada

ALSO PRESENT: SPECIAL AGENT MARI PANOVICH

Transcribed by: Margaret E. Griener, CCR #3, FCRR
Official Reporter
400 South Virginia Street
Reno, Nevada 89501

1 LAS VEGAS, NEVADA, MONDAY, NOVEMBER 7, 2016, 10:02 A.M.

2 ---o0o---

3
4 THE CLERK: This is the time set for calendar
5 call in case number 2:16-CR-100-GMN-CWH, United States of
6 America versus Jan Rouven Fuechtener.

7 Counsel, please state your appearances for the
8 record.

9 MS. ROOHANI: Good morning, your Honor. Elham
10 Roohani and Lisa Cartier-Giroux for the United States. We're
11 joined at counsel table with Special Agent Mari Panovich.

12 THE COURT: Good morning, Special Agent
13 Panovich. Good morning, Ms. Roohani and Ms. Carter-Giroux.

14 Shall we put down that armrest so we can see you
15 all better? It seems like -- unless you're planning to use it
16 and it's set up for use, otherwise I can't really see you very
17 well.

18 Go ahead. Defense counsel.

19 MR. MARCHESE: Good morning, your Honor. Jess
20 Marchese and Benjamin Durham on behalf of Mr. Fuechtener.
21 He's present and in custody.

22 THE COURT: Good morning, Mr. Marchese. Good
23 morning, Mr. Durham and Mr. Fuechtener.

24 All right. I'm still waiting for the computer
25 to start up, but I know that we're on calendar today both for

1 calendar call, and also there is a renewed motion to exclude
2 the alibi defense notice that has not yet been provided.

3 There was a response that was filed by the
4 defense that I wasn't quite sure how to interpret it. It --
5 on the one hand it seems to argue that because the government
6 failed to request timely the notice within the timeline set
7 either in the statute or in the discovery scheduling order,
8 pretrial order, that it had either waived its right, or,
9 because they were allowed to have more time, that the defense
10 should be allowed to have more time.

11 But I wanted to get into more the details to
12 determine whether or not there's good cause.

13 First of all, I couldn't find where there was a
14 specific date that was provided by the defense for the
15 continuance. I know you're asking for more time, but I don't
16 know if it's a day, two days, three months. How much time is
17 it that you're requesting?

18 And I realize that there's 15 different dates
19 here that were provided by the government, so the notice for
20 alibi is not just a one-date, one-time defense, it's 15
21 different dates and times -- not 15 different dates, but
22 certainly 15 different incidences.

23 MR. MARCHESE: Your Honor, we're just prepared
24 to submit it on the record of what we filed and what's in the
25 government's motion.

1 THE COURT: I didn't understand that. So when
2 do you want to file a notice of alibi?

3 MR. MARCHESE: Well, at this point we wouldn't
4 be filing anything.

5 What had happened is we got a new batch of
6 discovery, so based on that we needed to go through a few
7 hundred pages, namely some bank records and documents. So
8 based upon that, we didn't see anything that would necessitate
9 the need to file anything.

10 THE COURT: All right. So you do not intend to
11 file a notice of alibi.

12 MR. MARCHESE: Not at this time, no.

13 THE COURT: All right. So it sounds like the
14 government's motion is moot then at this point.

15 MS. ROOHANI: Well, your Honor, it's not moot
16 because if they are not intending to use the alibi, then we
17 would move to exclude it because our concern is, is that at
18 the time of trial they will try to raise an alibi defense.

19 MR. MARCHESE: We were given some dates and
20 times approximately three weeks ago by the government. Those
21 dates and times we do not intend to notice any alibi in which
22 we would be required to under the statute.

23 So at this time I don't think -- I don't know
24 what else to say other than we wouldn't be filing any notice
25 of alibi.

1 THE COURT: So you're no longer seeking extra
2 time to file the notice of alibi.

3 MR. MARCHESE: That is correct, your Honor.

4 THE COURT: All right. So then I can grant the
5 government's motion, is that your position, that you're not
6 opposing the government's motion?

7 MR. MARCHESE: Well, the only thing we would
8 still say is that it was untimely by the government based upon
9 both the local rules and the federal statute.

10 THE COURT: All right. And that's true, and I
11 think that that's fair to say that it was untimely. However,
12 it was eventually posted.

13 There's no request for it, for the Court to
14 acknowledge good cause for the late tender of the request for
15 an alibi, but because there is no alibi notice to be tendered,
16 and there's no extension being requested, then the motion will
17 be -- the government's motion will be granted without
18 opposition from the defense.

19 The last thing that we need to address, I think,
20 unless you've got something new, is the timeline for trial
21 starting on Monday. We're scheduled to start at 8:30, and
22 we've got all day on Monday.

23 Tuesday we just need to end a little early at
24 11:30 because I've got some students coming in, but
25 otherwise -- oh, no. Am I doing the attorney admission

1 ceremony on Tuesday as well?

2 All right. So Tuesday, the 15th, we have an
3 attorney admission ceremony at 4:30 so we'll be stopping at
4 about 4:15. It's just next-door so all I have to do is get
5 off the bench and go next-door.

6 So on Tuesday we'll plan to be here from
7 8:30 a.m. until 11:30 when the students get here, and then
8 we'll resume again at 1:00 until 4:15.

9 On Wednesday we need to start later because
10 we've got things in the morning. So we can start -- we can --
11 maybe can we just do the afternoon on Wednesday from 1:00 to
12 5:00?

13 And then let me give you the whole week calendar
14 so you can tell me if that works for you.

15 Aaron, are you planning to move those
16 sentencings on Thursday morning?

17 THE CLERK: It depends on how long the parties
18 anticipate they'll need for trial. If it's going to be less
19 than, you know, about four days or so, I think we can keep
20 those on half day, just do a half day in the afternoon for
21 trial.

22 THE COURT: Well, but the 1:30 is a motion -- is
23 the preliminary injunction motion with the city.

24 THE CLERK: The 1:30 we would most likely move
25 to 11:00, your Honor.

1 THE COURT: Okay. So Thursday we might do just
2 the afternoon. If you need more time, we can move everything
3 except for the preliminary injunction motion with the city,
4 but the sentencings could be moved.

5 And then Friday -- it looks like the only thing
6 I have Friday is there's the Veteran's Treatment Court
7 graduation ceremony at 9:30 until 11:00. So we would have the
8 afternoon on Friday, the 18th.

9 Monday is actually not a calendar call day, is
10 that right, Aaron, the 21st?

11 THE CLERK: That's correct, your Honor.

12 THE COURT: So it looks like we actually have
13 all day Monday if we need to, and since we won't have a jury,
14 we don't to have worry about them over the weekend, and
15 Tuesday we have all day.

16 So how does that schedule work out for you,
17 Ms. Roohani? Do you anticipate you'll be able to put on the
18 government's case with that timeline?

19 MS. ROOHANI: Yes, your Honor. We anticipate
20 being finished no later than Wednesday based on this timeline.

21 THE COURT: Even with the half day on Wednesday?

22 MS. ROOHANI: Including the half day on
23 Wednesday.

24 THE COURT: Okay.

25 MS. ROOHANI: At the very latest.

1 THE COURT: All right. And, Mr. Marchese, does
2 this timeline so far explained, does that seem to be enough
3 time for you all?

4 MR. MARCHESE: Yes, it does, your Honor.

5 THE COURT: Okay.

6 MR. MARCHESE: I would anticipate our case in
7 chief taking approximately one day, and then obviously without
8 the jury and things outside the presence, I think that that
9 would certainly expedite things.

10 THE COURT: Okay. Now, since it is a bench
11 trial instead of a jury trial you don't need to provide
12 proposed jury instructions, of course, but some kind of a
13 bench memo, findings of fact, conclusions of law, something
14 like that to tell me ahead of time which elements you think
15 need to be proven or which defenses are available would be
16 helpful and would probably speed things up if you wanted to
17 file that. I'm not going to require you to, but if you want
18 to, that might be helpful.

19 Let's see. Also -- it also looks like we would
20 have some time on Wednesday, the 23rd, if it takes that much
21 longer. That looks like that would be fine.

22 So anything else that you need me to address
23 before you can prepare and be ready to begin at 8:30 Monday?

24 MS. ROOHANI: I have two small housekeeping
25 matters. Will your Honor require opening statements from us?

1 Do you prefer them, not prefer them? Seeing as how this is a
2 bench trial, would you prefer for us just to --

3 THE COURT: I don't require them. It's an
4 option if you want to exercise it, it's available to you. If
5 you don't want to exercise it, you don't have to.

6 MS. ROOHANI: Okay. And then we have Dennis --
7 Sergeant Dennis Carry. We intend to recall him. Would your
8 Honor be okay with that, or would you prefer for us to put
9 Mr. Carry on all at once?

10 THE COURT: So you think you'll need him in
11 rebuttal, is that what you're saying?

12 MS. ROOHANI: No, no. We are intending to call
13 him at the beginning to explain the GigaTribe platform and
14 then later on to just talk separately about chats that will be
15 introduced into evidence by other witnesses, therefore we're
16 going to need to split his testimony. He would obviously be
17 on recall --

18 THE COURT: I don't have any preference. That's
19 up to Mr. Marchese if he wants to object to permitting him to
20 just testify to everything all at once, or if he prefers to
21 wait and make sure that the foundation is laid before he gets
22 into his second area.

23 MR. MARCHESE: Your Honor, I think that's
24 probably something that the government and Mr. Durham and
25 myself need to discuss.

1 THE COURT: Okay. Anything else?

2 MS. ROOHANI: Ms. Cartier-Giroux has two points,
3 your Honor.

4 THE COURT: Yes.

5 MS. CARTIER-GIROUX: Your Honor, I just wanted
6 to make sure that this is correct information.

7 We had -- there was some issues with regard to
8 reciprocal discovery.

9 I did file a motion to compel because we haven't
10 had any conversations about it, there's never been a point
11 where we were at -- you know, "I'm not going to give this to
12 you," or, "you're not entitled to it."

13 But I just want to make sure, clarify that I
14 understand, we went through defense's exhibit list, and it's
15 my understanding that all the exhibits, with the exception of
16 the aerial photo, the video, and the Dropbox, which would be
17 5027 and 5037, are in -- are our discovery. They're actually
18 taken out of our discovery.

19 We don't have, however -- that's what the
20 defense has told me. We don't have 5001 and 5002 which are
21 photographs, and I confirmed it with the agent, of the
22 defendant's spouse and another individual named Kevin.

23 We also still do not have 5027 which is a
24 Dropbox, I believe, photograph, as well as 5028 which is an
25 aerial photograph of the house, and 5037 which is also a

1 Dropbox photograph, I believe, or screenshot.

2 Also, there was a video that we had discussed at
3 one point in time. We had the video that was made by the real
4 estate agent, but we don't have the edited version of that
5 video, so we don't know what that looks like because I believe
6 they were going to take out some stuff from it including,
7 like, the editorial comments that are on it.

8 So those are the items that are outstanding for
9 us with regard to reciprocal discovery.

10 I was told that there is no reciprocal discovery
11 as to their witnesses which is fine. The only issue that I
12 have is -- potentially have, and I'm just -- it may not be an
13 issue, but there's a person on their witness list named Joel
14 Rosal -- Rosales who gave a statement to the FBI that was, I
15 believe, actually -- yeah, in a 302. The substance of the
16 statement has been turned over.

17 If there's any indication that he is going to
18 testify inconsistently with that statement, then he would
19 potentially be entitled to an attorney because he could assert
20 the Fifth.

21 So I just want to front that with the Court that
22 that may be an issue, we may need to have somebody on the
23 panel available in case that is.

24 I don't know if he's -- I have no information
25 that he's going to testify inconsistently to his prior

1 statement, but that may become an issue during the trial.

2 THE COURT: All right. Well, I appreciate that.

3 So what exhibit number is the real estate video?

4 MS. CARTIER-GIROUX: It's not on the actual
5 list, but we did have discussion that that may be offered.

6 THE COURT: Okay. So you have the full -- full
7 version of the video but just not the edited version.

8 MS. CARTIER-GIROUX: The one that they wish to
9 admit now.

10 THE COURT: All right. So, Mr. Marchese,
11 exhibit numbers 5001, 5002, 5027, 5028 and 5037, they're all
12 photos either of Dropbox or of individuals or aerials. Are
13 they different than the ones that the government already
14 possesses? Are they something new that the defense created?

15 MR. MARCHESE: The only one of those items that
16 is not in the government's possession is the aerial photo. We
17 can get that over to them. It's just simply something we
18 printed off Google maps so nothing spectacular.

19 Everything else is in the government's
20 possession. The video they have in its entirety. I have
21 someone working on just cutting out the first portion, it's an
22 introduction by a real estate agent, not necessarily relevant
23 to the proceedings here.

24 THE COURT: Okay. So you're going to provide to
25 them the edited version of the real estate video by when?

1 MR. MARCHESE: Today.

2 THE COURT: Okay. So let's say 5:00 p.m. today?

3 MR. MARCHESE: Yep.

4 THE COURT: Okay. Then what about the aerial,
5 number 5028?

6 MR. MARCHESE: We can do the same, 5:00 p.m.
7 today.

8 THE COURT: Okay. And then the government
9 doesn't think it actually has 5001, 5002, 5007, and 5037, but
10 these are things that you obtained from the government?

11 MR. MARCHESE: From their devices.

12 THE COURT: From their --

13 MR. MARCHESE: Well, the Dropbox information
14 they just subpoenaed. Further, it's already on the devices.
15 Apparently they don't know that, but it's on their devices.

16 But the information regarding the picture, that
17 was taken off of their devices that they seized, so.

18 The only thing they're not in possession of that
19 they're discussing would be the video which was already given
20 to them, so technically they are in possession of it, and the
21 aerial photo.

22 MS. CARTIER-GIROUX: I'm somewhat confused
23 because I have an e-mail from Mr. Marchese saying that I have
24 everything except 5027 and 5028, that he is going to send me
25 5027, and then we'll send you 5028.

1 So I'm confused about what I have and what I
2 don't have because those are Drop -- my assumption, and,
3 again, this is an assumption, is that they are Dropbox
4 screenshots that their investigator, or whoever, expert took
5 on a specific date at a specific time, that they are going to
6 offer, and they are relevant because of the specific date and
7 the specific time.

8 So I'm asking that I be provided with those.

9 MR. MARCHESE: I will provide it even though
10 they're already in possession of it. It's on their devices.

11 THE COURT: All right. So 5027, 5028, and the
12 edited version of the real estate video will be provided by
13 5:00 p.m. today.

14 And the other ones that are outstanding, and
15 it's 5001, 5002, are photographs of a person? Is that what
16 that was?

17 MS. CARTIER-GIROUX: A person named Frank, who I
18 believe is the spouse of the defendant, and another individual
19 named Kevin.

20 THE COURT: All right. And so, Mr. Marchese,
21 the photographs of Mr. Frank, Mr. Kevin, these are also things
22 that you retrieved from the government's discovery?

23 MR. MARCHESE: I pulled it off of the -- I want
24 to say item 1B5, don't quote me on that, but it was off of the
25 discovery. That's where I got it from.

1 THE COURT: Okay. And same with the Dropbox
2 5037 photo?

3 Now, what about the --

4 MR. MARCHESE: I believe 5037 would be the one
5 in which the government took issue and said it was a very
6 small thumbnail with child pornography.

7 THE COURT: Okay. And so that's the one that's
8 under seal on the docket in this case?

9 MR. MARCHESE: I believe so, yes, your Honor.

10 THE COURT: All right. And then as to potential
11 witness Joel Rosales, I'll go ahead and ask Aaron to contact
12 Sharon who is the administrator for the CJA attorneys and ask
13 to have a CJA attorney available on the day that he's going to
14 be called. I don't imagine that you can anticipate at this
15 moment exactly what day and time he'll be called.

16 MR. MARCHESE: Yeah.

17 THE COURT: But if you'll please let the Court
18 know -- if you could let us know the day before, then we can
19 make sure to have an attorney here just to make sure that that
20 person is aware of what their rights and responsibilities are
21 so they don't inadvertently get themselves into trouble if
22 they didn't need to.

23 I want to make sure that their testimony is
24 intelligent and that they have an opportunity to talk to an
25 attorney.

1 All right. So that will be the order. So the
2 defense will let the Court know the day before they call Joel
3 Rosales so we can have a CJA attorney meet with that person.

4 Anything else, Mr. Marchese, you want me to
5 address?

6 MR. MARCHESE: We had some issues into
7 reciprocal -- as to reciprocal discovery from the government,
8 specifically items 2B and C, are some screenshots of some
9 GigaTribe chats with the undercover agent from buffalo. We
10 still don't have those in our possession.

11 THE COURT: Ms. Roohani?

12 MS. ROOHANI: Your Honor, the screenshots come
13 from a video that the undercover created of the session where
14 he downloaded the videos from the defendant's computer. That
15 video also contains child pornography so we can't produce a
16 video. It's been available to the defense from the very first
17 day of this case at the FBI headquarters.

18 Our intention is, because the video moves very
19 quickly, at the time of trial to create a screenshot for the
20 court to be able to view that specific chat.

21 That screenshot is, of course, pulled from the
22 video, and the video has always been available.

23 I've instructed Mr. Durham and Mr. Marchese that
24 that video has been available to them and that they're able to
25 go look at it.

1 At this point we don't have a screenshot. Once
2 we have it, we can obviously produce it to them, but because
3 it's pulled from the video, and we intend to introduce that
4 video at the time of trial, it's -- it's just a screen grab
5 from the original video which has always been available.

6 THE COURT: Okay. So when can we provide to
7 them the screenshots that are represented in Exhibits 2B and
8 2C?

9 MS. ROOHANI: If you give me a moment, your
10 Honor.

11 (Discussion held off the record.)

12 MS. ROOHANI: Your Honor, Special Agent Panovich
13 will work on that today, and we can get it to them by close of
14 business tomorrow.

15 THE COURT: Okay. So 5:00 p.m. on Tuesday.
16 That will be the order, that by 5:00 p.m. on Tuesday the
17 government will provide to the defense the two screenshots
18 that are in Government Exhibits 2B and 2C.

19 MR. MARCHESE: And will that include the
20 GigaTribe chats with the agent as well?

21 THE COURT: I think that's what's represented on
22 the screenshot is the chat; is that right?

23 MS. ROOHANI: Yes, there's a single screenshot
24 of a chat. There's not multiple screenshots, it's one
25 screenshot that has a listing of numerous chats on it on one

1 screenshot.

2 Your Honor, I'd like to make clear that the
3 session, because it's a video, we're doing the screenshots to
4 assist the Court at the time of trial. So would your Honor
5 like for us to produce just the chat?

6 Because there's numerous pages involved
7 because -- additional pages include the files that were
8 downloaded, the process of downloading the files, the IP
9 addresses, additional things like that so --

10 THE COURT: Well, I think what the defense is
11 asking for is the actual two screenshots that you're going to
12 be asking to admit into evidence, 2B and 2C, and then, if they
13 want to go back and look at the video again to see that chat
14 in context, then you're saying that video has been available
15 to them all along, and whenever they want to look at that they
16 can.

17 MS. ROOHANI: Yes.

18 MR. MARCHESE: It's just very difficult --
19 there's 37 devices that were seized so it's almost like a
20 needle in a haystack when we send Mr. Smith down there to --

21 THE COURT: I understand. You want to see the
22 needle and then you want to be able to go back and look at the
23 haystack and see where that needle was in that haystack.
24 Absolutely, you have the right to have that.

25 And that is the order, the government will

1 produce both screenshots 2B and 2C by 5:00 p.m. tomorrow
2 Tuesday. What is that? November 8th.

3 All right. Anything else?

4 MR. MARCHESE: And then there are also some jail
5 calls which the government intends to introduce at trial. I
6 believe we have all the jail calls, we just need dates on them
7 because there's -- there was just another batch of discovery
8 dropped off I think Friday, so it's getting somewhat
9 voluminous in reference to the number of jail calls, so we
10 just need to know which ones they are.

11 THE COURT: And so have they been indicated on
12 the exhibit list already?

13 MR. MARCHESE: Just generally speaking jail call
14 is the way it's written out.

15 THE COURT: Okay. Which exhibit numbers are
16 those?

17 MR. MARCHESE: 25A through 25 -- 27A.

18 THE COURT: All right. So, Ms. Roohani, 25A
19 through 27A, those are just audio recordings, or do we have
20 transcripts too?

21 MS. ROOHANI: Your Honor, we have 20 -- I'm
22 sorry, could you ask that question again?

23 THE COURT: Yes. So 25A through 27A, are those
24 all audio files or are they audio files and transcripts?

25 MS. ROOHANI: Right. So the calls, they have

1 been provided with all of the calls. We have selected -- of
2 all of the calls we have only translated 12 of the voluminous
3 number of calls.

4 We produced all those translations to the
5 defense. Of those 12 translations we intend to use three of
6 the 12.

7 So 25A is the recording, and then 25B would be
8 the translation of that recording. Same for 26A would be the
9 actual recording. We have to produce it because it has to be
10 translated, or we have to introduce it because it has to be
11 translated so --

12 THE COURT: When you say translated, you mean
13 from German?

14 MS. ROOHANI: From German into English.

15 THE COURT: Okay. All right. So --

16 MS. ROOHANI: There's only -- they've been
17 produced -- we have produced all of the defendant's jail
18 calls, which there are many, hundreds of jail calls in German.
19 Of those hundreds of calls only 12 of those have been
20 translated for the government so we are really only in
21 possession of 12 of the translated jail calls, and that's
22 written translations. All those translations have been
23 produced.

24 THE COURT: The written have been produced but
25 not the audio or all the audio?

1 MS. ROOHANI: All of the audio. More audio than
2 written has been produced.

3 THE COURT: All right. Okay. So then what the
4 defense is asking for is the English translation of the three
5 calls that are 25A, 26A and 27A; is that right?

6 MR. MARCHESE: I just need the dates.

7 THE COURT: You just want the dates. So he just
8 wants what dates these calls are.

9 MR. MARCHESE: Yeah.

10 MS. ROOHANI: Your Honor, the problem with the
11 way that the translations are done is that it's not a date
12 because of the way that Henderson produces calls, so it's a
13 file number, and so if they would like the file number, it's
14 one file number, but I'm happy to produce that to them as
15 well. I can do that by five o'clock tomorrow.

16 THE COURT: Does the file number indicate the
17 date? Is it like the Metro event numbers where you can kind
18 of extrapolate what the date is from it?

19 MS. ROOHANI: The file number doesn't indicate
20 the date, but there's an index that's produced by Henderson
21 when they produce jail calls to the government, and that index
22 would indicate the date that that call is filed on.

23 THE COURT: Okay. And so does the defense have
24 that index so they can match the file, the file to the date?

25 MS. ROOHANI: It was produced at the same time

1 that the original jail calls, the audio of the jail calls was
2 produced so they should absolutely have it.

3 THE COURT: Okay. So if you'll please produce
4 the file -- what did you call it, the file number?

5 MS. ROOHANI: It's a -- it's a --

6 THE COURT: The identifier, the Henderson
7 identifier.

8 MS. ROOHANI: Identifier.

9 THE COURT: For those three calls to the defense
10 so they can look it up on the index and verify that they've
11 got the right date and time.

12 Could do you that by 5:00 p.m. Tuesday as well?

13 MS. ROOHANI: Oh, absolutely, yes.

14 THE COURT: Okay. That will be the order as
15 well, that the identifying file number for the three calls
16 represented in proposed Exhibits 25A be -- I'm sorry, 25A
17 through 27A will be provided to the defense by Tuesday
18 November 8, 5:00 p.m.

19 MR. MARCHESE: And, I'm sorry, just one more
20 issue.

21 THE COURT: No, that's fine. That's why we're
22 here.

23 MR. MARCHESE: There's a Bank of America credit
24 card statement which is Exhibit Number 24. We just need to
25 know which month that is and the account that's for.

1 THE COURT: All right. Ms. Roohani, number 24
2 from Bank of America.

3 MS. ROOHANI: I can also indicate it's in their
4 possession. I can narrow it down for them and tell them which
5 specific one our exhibit is.

6 Your Honor, if I can make one point, we've asked
7 the defense on numerous occasions to identify for us specific
8 things, and at this point we're agreeing to do that so we
9 would ask that they also be required to do the same things
10 that we're doing.

11 THE COURT: Well, of course, that's what the
12 scope of discovery is.

13 But let's go back to Exhibit 24. I don't
14 understand, what are you asking for, for the Bank of America
15 record?

16 MR. MARCHESE: We have a rather large amount of
17 bank statements, we just want to know which one they're using.

18 MS. ROOHANI: I can do that by five o'clock
19 tomorrow as well, your Honor.

20 THE COURT: All right. So you're saying that
21 the list doesn't identify which one or is it all of them?

22 MR. MARCHESE: It's just generic, it just says
23 Bank of America credit card statement, so we don't --

24 THE COURT: Okay. So is the government going to
25 use all of them or is it a specific --

1 MS. ROOHANI: There is a specific one, and I
2 will identify which one it is and send it to them.

3 THE COURT: Okay. And then what else is it from
4 the defense, Ms. Roohani, that you would like to have more
5 specificity about on their exhibit list?

6 MS. ROOHANI: Your Honor, it's every one of
7 their exhibits doesn't indicate what device it came from, and,
8 as Mr. Marchese has indicated, there's 37 devices.

9 There are certain devices that the government is
10 focusing on which have the child pornography on, and other
11 devices that don't have child pornography obviously will not
12 be brought into the government's case in chief, but if they
13 are intending to being brought into the defense's case in
14 chief, they should also be identified.

15 Now, I don't need to know specifically what is
16 the file number, but I'd like to know what device it's from so
17 they can at least go back and determine whether that's
18 relevant in any particular way so we can at least formulate
19 what our objection is going to be to that.

20 In terms of -- so, for example, 5001 and 5002,
21 which we've already indicated, I'll talk about other ones,
22 5003 to 5016, they say photos. We asked, "Are these the
23 search warrant photos that we provided? If not, we need
24 copies." Our response is, "It's in your discovery."

25 So asking us to also go through the haystack is

1 the same problem that they have, and so if we are being
2 cooperative and producing specific identifiers, then I feel
3 that the defense should also be required to do the same.

4 Same for 5017 to 5019, the diagrams, we asked
5 are these the diagrams of the house that we provided in
6 discovery, if not we need copies.

7 5020 to 5026, photos, are these the search
8 warrant photos that we provided, if not, we need copies.

9 5027 and 5028 we've already discussed.

10 Same for 5029 to 5032, photos, are these the
11 search warrant photos that we provided.

12 5033A and B, diagram, again, are these diagrams
13 that we provided in discovery.

14 The show schedule is fine, GigaTribe printouts,
15 5035A through H, are these the items we provided in discovery.
16 If so, from which device. If not, we need copies.

17 For virtually every single one of their listed
18 exhibits we've asked the question, and we haven't gotten an
19 answer, and so we are relying on their representations that it
20 comes from our discovery, but we have no idea where from our
21 discovery it comes.

22 THE COURT: All right. And you're referring to
23 Document 92 on the docket, their exhibit list?

24 MS. ROOHANI: Docket 92, correct.

25 And I asked for this information on -- well,

1 this is the third time, we asked for this information was on
2 October 31st.

3 We also asked about Skype chats 5038. 5039
4 they've provided to us. 5040 we asked about the Grindr chat.
5 We have not gotten a copy of that either, or at least no
6 indication of where it potentially came from.

7 MR. MARCHESE: It all came from the discovery,
8 your Honor.

9 But I will make myself available. If they would
10 like to come down to my office, I will get all the exhibits, I
11 will put them in my conference room, they are welcome to look
12 at them any time. They can make an appointment, our office is
13 one block south of here, so that way there will be no
14 confusion whatsoever for that.

15 THE COURT: Well, I'm looking at the
16 defendant's -- I'm sorry, the government's exhibit list which
17 is number -- what is that? -- 86 on the docket. They identify
18 the devices, for example, 1B7, My Passport external HD, or
19 1B13, Apple MacBook, or 1B16, MacBook Pro.

20 So are these the terms that are used by the
21 individuals who seized -- is this maybe like on the search
22 warrant return? Where are these numbers coming from, the
23 1B16, 1B13 --

24 MS. ROOHANI: Your Honor, when the devices were
25 collected and then they were imaged, they were assigned a

1 number. So those are the numbers that the government and the
2 defense also knows that those numbers are referred to. They
3 come from the IDF reports and also the NetClean reports are
4 all associated with a number. So 1B1 is the same device on
5 all of the reports.

6 THE COURT: Okay. Could the defense then maybe
7 help out and -- because I looked at your exhibit list number
8 92, and it doesn't identify a device. So could you identify
9 it just using that identifier, the 1B13, or 1B16, 1B21, narrow
10 it down a little bit?

11 MR. MARCHESE: No. The greater majority, I
12 would say 95 percent of the photos that we intend upon using
13 at trial, with the exception of one photo which was already
14 given to them, were in the initial discovery match.

15 So we just simply took the photos that they gave
16 us that I would assume would be for some representative of the
17 FBI or law enforcement, and we just printed them up. That's
18 where the majority is from. I think there's one or two
19 pictures from one of the devices.

20 Offhand, I -- like I said, I think it was from
21 1B5, but I could be wrong. I'd have to go back and check. I
22 just simply printed it off, but it was definitely, positively
23 from their device.

24 THE COURT: All right. So what you're telling
25 me, when the photographs were disclosed to you by the

1 government, they didn't indicate in anyway which computer or
2 which device those photos came from so you can't identify it
3 back?

4 MR. MARCHESE: The majority of them are just
5 from the search so they weren't from the devices. So I think
6 I took one photo or two photos off of the devices.

7 So it's not really -- it's not really the
8 situation here. They have the great majority of the photos.
9 But, like I said, just come to the office, I'll make time,
10 just give me a date and time, I'll lay it all out.

11 If they have any questions -- I mean, I feel
12 like we're being accused of hiding the ball here, and I'm
13 trying to be accommodating.

14 THE COURT: Well, I haven't seen this so I can't
15 just, by looking at the exhibit, know how clear or how vague
16 the descriptions are.

17 So, for example, for exhibit number 5015 where
18 it says photo of MacBook Air, if there's only one MacBook Air
19 that was seized, then that's pretty clear what you're talking
20 about. If there's 12 MacBook Airs seized, I could see why the
21 government would be wondering, well, which one is it referring
22 to.

23 But you're telling me that these photographs
24 come from the government, and the photograph didn't identify
25 which MacBook Air it was. You can just tell from the

1 photograph it is a MacBook Air.

2 MR. MARCHESE: Just simply taking a picture of
3 something --

4 THE COURT: All right. So you can't really
5 prove that -- you're not withholding any information, you
6 don't have the information to give, but you're willing to at
7 least show the government which photos it is so they can --

8 MR. MARCHESE: Absolutely.

9 THE COURT: -- see where in their stack of
10 photos it came from.

11 Okay. So it sounds like this is unfortunately a
12 problem from the government's inadvertent making of not --
13 since the government didn't identify for the defense where the
14 photos came from, then the defense can't identify to the
15 government where those photos came from other than that they
16 were provided by the government.

17 MS. ROOHANI: Your Honor, the search warrant
18 photos were produced in the initial batch of discovery. There
19 are over 200 --

20 THE COURT: Were they numbered? I mean, this is
21 what the defense is saying, is they had no way of telling you
22 which photo it is. If there's four different views of the
23 same MacBook Air, they can't tell you which one it is or which
24 MacBook Air it is.

25 MS. ROOHANI: When the photos were originally

1 produced, they were produced on a disk. Obviously when
2 they're produced on a disk, each file has a name, and so
3 they're not Bates stamped, but each file that they might be
4 potentially using has a number associated with it.

5 And I -- I'm not worried about the search
6 warrant photos, your Honor, because obviously we have the
7 search warrant photos, but we can't get any clear indication
8 of are these actually search warrant photos or are they photos
9 from a device, because there's no clarity in their exhibit
10 list. It says photo, it doesn't say search warrant photo as
11 opposed to a device photo, and then if -- so if a device
12 photo, which device.

13 And so now I'm concerned because they have --
14 and also, your Honor, for the search warrant photos we
15 produced a photo log specifically indicating where the device
16 was found, where the photo was taken, who it was taken by. So
17 in terms of that it would be easy.

18 Again, your Honor, I'm not worried about the
19 search warrant photos, we have all the search warrant photos,
20 we can look through them.

21 The bigger issue is when the defense has asked
22 us, we have Hot Mail, we have five Hot Mail e-mails listed on
23 there, they asked us can you please identify which Hot Mail
24 e-mails, so we responded and said this date, this time, this
25 sender, this is the e-mail.

1 And so we have been as forthcoming as we can
2 possibly be in identifying what things are on our exhibit
3 list, and we just can't get a clear answer.

4 And so if the answer is it's in your discovery,
5 go look in your discovery, that's manifestly unfair that we
6 have to go and look through the same amount of discovery that
7 they have and we have to identify that they don't have the
8 same responsibility to identify for us.

9 I'm not worried about the search warrant photos,
10 it's the other photos from the other devices that they've just
11 indicated that they intend to use. Which device did it come
12 from. There's 37 -- 38 devices that were collected.

13 THE COURT: All right. Well, they tell me
14 that -- the photographs, you can come look at them and --

15 MR. MARCHESE: I mean, they asked for it, and
16 it's in the discovery. There was never a follow-up. I just
17 think this is mushrooming into something that is not meant to
18 be.

19 Any time, I've said it clearly, they can come by
20 my office, make an appointment, we are not intending to hide
21 the ball. Any time they want, if they want to meet on the
22 weekend, if they want to meet on Friday, on Veteran's Day, I
23 will make myself available, either myself or Mr. Durham will
24 make the time, so that way they feel that there's no manifest
25 injustice or anything like that.

1 THE COURT: All right.

2 MS. CARTIER-GIROUX: Your Honor, just to
3 simplify, if there aren't very many photos that were moved
4 from devices, could we just be advised which device the photo
5 was taken off of? That's all we're asking for at this point
6 in time.

7 If it's a search warrant photo, we're not
8 concerned about it, I can look at the photo log and I can
9 identify it while we're sitting here in trial.

10 If it's from 1B1, and it's a photo, and I can't
11 verify that that's on the device, then I'm going to need time
12 to look through that device again. There are millions of
13 photos on these devices. That's why we've limited what we're
14 going to offer.

15 So just saying it's in the discovery, I don't
16 know what device it came off of, makes it near impossible --
17 even if I go look at the photo, it doesn't tell me where it's
18 coming from.

19 So if there really is a limited number, and they
20 removed it from a specific device in order to enter it into
21 evidence, they would have to know what that device came
22 from -- what device that photo came from.

23 All I'm asking that is they identify the photos
24 from which device that are not search warrant photos, that's
25 all.

1 THE COURT: All right. So, Mr. Marchese, can
2 you do that by either 5:00 p.m. today or tomorrow?

3 MR. MARCHESE: I will try. I cannot guarantee
4 it. I disagree with their representation of the law, that if
5 we can't say which device it came from, then it's not
6 admissible into evidence.

7 I mean, we can lay a foundation that it's a true
8 and accurate depiction of Frank and Kevin. It's not that
9 difficult. But I will do my best. I'm just not a hundred
10 percent sure which devices it came off of.

11 Regardless I'll be happy to give them copies of
12 the photos. I don't see the relevance of them bringing it off
13 of -- saying which device it was brought off of, but,
14 regardless, I'll do my best and see.

15 THE COURT: All right. Well, the Court agrees
16 that the foundation that needs to be laid for the exhibit
17 depends on what the exhibit is being used for.

18 If it's just being used to show what the two
19 individuals look like, then you wouldn't need to know when the
20 photo was taken or where it was found or anything like that.

21 If it's being offered for the purpose of showing
22 what is on the computer at a certain date and time, then
23 obviously we're going to need to have a foundation of what
24 date, what time this photo was taken.

25 So we'll go ahead and just ask you all to please

1 cooperate as much as you can. I know there's a very short
2 amount of time left before trial, but, if you can get together
3 and finalize the rest of these details. If not, we'll have to
4 take some breaks during trial and just kind of delay
5 everything.

6 MR. DURHAM: Your Honor, if I can also -- just
7 to clarify.

8 THE COURT: Yes, Mr. Durham.

9 MR. DURHAM: Exhibit 2H, which is the disk of
10 the undercover video which was GigaTribe chat, that disk is
11 available for us to view; is that correct?

12 MS. ROOHANI: Absolutely.

13 MR. DURHAM: And is that disk on its own or is
14 that part of a larger batch of discovery?

15 MS. ROOHANI: It is. It's not from a device at
16 all. It is a separate CD, DVD, that has video from the
17 undercover and the screen of the undercover as he's conducting
18 the downloads.

19 MR. DURHAM: Okay.

20 THE COURT: So it's a screenshot of the
21 undercover's screen.

22 MS. ROOHANI: Yes.

23 THE COURT: As he's chatting with that other
24 person.

25 MS. ROOHANI: Yes.

1 THE COURT: Okay. And that's the one that's
2 described as GigaTribe chats with undercover TFO.

3 MS. ROOHANI: Yes, the CD video, yes, 2A I
4 believe it is.

5 MR. DURHAM: Okay. But the screenshots have not
6 been created yet, but we can go look at the video.

7 MS. ROOHANI: Absolutely.

8 THE COURT: And that's the one that we were
9 talking about earlier, 2B and 2C?

10 MS. ROOHANI: Yes.

11 MR. DURHAM: And the video is 2A.

12 MS. ROOHANI: Yes.

13 THE COURT: All right. Okay. All right.
14 Anything else?

15 MS. ROOHANI: Not from the government, your
16 Honor.

17 THE COURT: All right. We'll see you at 8:30 in
18 the morning on Monday -- I lost my calendar -- Monday,
19 November 14th.

20 -o0o-

21
22 I certify that the foregoing is a correct
23 transcript from the digital recording of proceedings
in the above-entitled matter.

24 /s/Margaret E. Griener 5/3/2019
25 Margaret E. Griener, CCR #3, FCRR
Official Reporter